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Jurisdictional arrangements and international criminal procedure

Sarah M.H. Nouwen and Dustin A. Lewis

A. INTRODUCTION

A homicide that amounts to a war crime, crime against humanity or genocide—the crimes most commonly within the jurisdiction of international criminal tribunals—is at the same time a crime under most national laws, as the ‘ordinary crime’¹ of homicide or as a crime corresponding with the international definition, and thus also falls within the jurisdiction of one or several states. The same applies to many of the other *actūs rei* of the international crimes in the statutes of international criminal tribunals, for instance rape or torture. The creation of international criminal tribunals has thus led to more overlap in jurisdictions. This overlap serves the dominant aim of international criminal justice: the more courts with jurisdiction over an international crime, the more opportunities for combating impunity. But the overlap may also result in one specific case being pursued in several jurisdictions: in several national jurisdictions, in several international jurisdictions or, the focus of this chapter, in an international and a national jurisdiction. Judicial economy, the interests of the accused, the principle of state sovereignty and the factor of international concern require that such a conflict of jurisdictions is resolved. Jurisdictional arrangements are the rules and practices that have developed to regulate conflicts potentially emerging from overlapping international and national jurisdictions.

Jurisdictional arrangements are inextricably related to rules of criminal procedure. First, the arrangement itself is a procedure for managing competing claims to jurisdiction. Secondly, by providing circumstances in which the international tribunal may compel a state to defer to its jurisdiction,² may exercise its jurisdiction³ and may refer proceedings to

¹ *Report of the International Law Commission on the Work of its Forty-Sixth Session: Draft Statute for an International Criminal Court with Commentaries*, UN Doc. A/49/10 (1994), 58 describes a trial of an ‘ordinary crime’ as one in which the act is tried as a common crime under domestic law instead of an international crime with the special characteristics of the international crimes as defined in the Statute.

² Article 9(2) ICTY Statute and Rule 9 ICTY RPE; Article 8(2) ICTR Statute and Rule 9 ICTR RPE; Article 8(2) SCSL Statute and Rule 9 SCSL RPE; Article 4(2) and (3)(b)–(c) STL Statute and Rule 17 STL RPE.

³ Article 17 ICC Statute.

national jurisdictions⁴ that depend on particular features of the domestic justice system, jurisdictional arrangements can serve as a conduit for channelling rules of criminal procedure to national jurisdictions. International tribunals may thereby, in addition to functioning as a model, act as an instrument to influence domestic criminal procedure. Finally, rules of priority are invoked, applied and decided upon in accordance with specific rules of procedure.

This chapter elaborates the first topic, the procedure that is the jurisdictional arrangement, focusing on those elements of the jurisdictional arrangement that could weaken or strengthen the arrangement's conduit potential. On the basis of this analysis the conclusion suggests some hypotheses on the potential of various jurisdictional arrangements to serve as a mechanism to influence domestic criminal procedure.

B. THE PROCEDURE THAT IS THE JURISDICTIONAL ARRANGEMENT

Attempting to capture the jurisdictional arrangements of the various international criminal tribunals in simple terms, the field of international criminal law has come up with the labels 'exclusive', 'concurrent', 'primary' and 'complementary' jurisdiction. 'Exclusive' refers to an international criminal tribunal's depriving national courts of jurisdiction over the same crimes—a jurisdictional arrangement that in fact none of the international criminal tribunals to date has had. 'Concurrent' means that national courts keep their jurisdiction over the crimes which are within the international tribunal's jurisdiction—the dominant practice. Concurrence in jurisdiction requires rules of priority in the specific case. An international court's jurisdiction is 'primary' when, in a specific case, it takes precedence over the jurisdiction of national courts, and 'complementary' when it may exercise its jurisdiction only in the absence of (genuine) national proceedings.

It is, however, important to note that there is no 'exclusive' or 'concurrent' jurisdiction, or 'primacy' or 'complementarity' of jurisdiction in the abstract; the labels have been put on *specific* arrangements in *specific* statutes that provide for the *specific* circumstances in which an international criminal tribunal may or may not exercise jurisdiction when a national court has jurisdiction over the same crimes. The specific arrangements, rather than the labels put on them, should therefore be the starting point of the analysis. Such analysis reveals that most arrangements do not amount to full primacy or full complementarity, but are somewhere in between, rendering the tribunal's jurisdiction *more or less* primary and *more or less* complementary.

⁴ Rule 11 *bis* ICTY RPE; Rule 11 *bis* ICTR RPE; Rule 11 *bis* SCSL RPE; Articles 18 and 19(11) ICC Statute.

i. IMT and IMTFE

Neither the Constitution of the International Military Tribunal (IMT) nor the Charter of the International Military Tribunal for the Far East (IMTFE) contained explicit provisions on what is nowadays termed exclusive or concurrent jurisdiction or on the respective tribunal's jurisdiction being primary or complementary. However, when using today's terminology for the arrangement at the time, one can qualify the arrangements of both tribunals as one of concurrent jurisdiction with, at least in practice, primacy for the international tribunals.

The jurisdiction of the IMT was concurrent with that of national courts. The 1943 Moscow Declaration had provided that 'those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.'⁵ The declaration was expressly 'without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by joint decision of the Governments of the Allies'.⁶ The latter took this decision in the 1945 London Agreement, establishing 'an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location'.⁷ Since crimes without 'particular geographical localization' usually fall within several national jurisdictions, the jurisdiction of the IMT overlapped with that of national courts. The IMT's Constitution did not establish exclusive jurisdiction for the tribunal. On the contrary, it explicitly provided that '[n]othing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.'⁸

⁵ [Moscow] Declaration of German Atrocities (released to the press Nov. 1, 1943) ('Moscow Declaration'), 9 *Department of State Bulletin* (1943), p. 311.

⁶ Moscow Declaration, *supra* note 5, p. 311.

⁷ Agreement for the prosecution and punishment of major war criminals of the European Axis ('London Agreement'), signed 8 August 1945, Article 1, 82 U.N.T.S. 279, 281 (1951).

⁸ London Agreement, *supra* note 7, Article 6. Article III(2) of the Control Council Law No. 10 in turn provided: 'Nothing herein is intended to, or shall impair or limit the Jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945'. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, pp. 50–55.

The IMTFE's jurisdiction, too, was concurrent with that of national courts. The Special Proclamation establishing the IMTFE expressly stated that '[n]othing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.'⁹

While the IMT's and IMTFE's respective jurisdictions were concurrent with that of national courts, neither of the tribunals' constitutive instruments provided a rule of priority in the event that both the international and a domestic court exercised jurisdiction over the same person. However, the London Agreement implied primacy of the IMT by reiterating in a preambular recital the paragraph in the Moscow Declaration according to which certain major war criminals would be punished 'by the joint decision of the Governments of the Allies'.¹⁰ Those states that signed up to the London Agreement thereby implicitly accepted the IMT's primacy.

In practice, the problem of competing claims to jurisdiction seems to have arisen neither with respect to the IMT nor the IMTFE: the international tribunals focused on a few dozen accused, while national and occupation courts as well as military commissions in Europe, the United States and Asia handled thousands of others.¹¹

Neither the IMT nor the IMTFE had provisions on whether the international tribunals could try a person after the person had been tried domestically. With respect to the reverse order, the IMT's Charter explicitly authorized the national authorities of signatories to the London Agreement to prosecute defendants convicted by the International Tribunal.¹²

ii. ICTY, ICTR, SCSL and STL

a. Concurrent jurisdiction

The Statutes of the ICTY and ICTR explicitly provide that their respective tribunal's jurisdiction is concurrent with that of national courts.¹³ So do the Statutes of the SCSL and

⁹ Special Proclamation—Establishment of an International Military Tribunal for the Far East, 19 January 1946, Article 3, *reprinted in* N. Boister and R. Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press 2008), p. 6.

¹⁰ London Agreement, *supra* note 7, preamble, and Moscow Declaration, *supra* note 5, p. 311.

¹¹ Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), pp. 48–49, 50.

¹² Charter of the International Military Tribunal, Article 11, 82 U.N.T.S. 279, 290 (1951), with an exception for the crime of membership of a criminal organisation.

¹³ Article 9(1) ICTY Statute; Article 8(1) ICTR Statute.

STL, with the difference that the respective provisions are limited to concurrence with the jurisdiction of the national courts of, respectively, Sierra Leone and Lebanon.¹⁴ In other words, the Statutes of the ICTY, ICTR, SCSL and STL do not deprive national jurisdictions of jurisdiction over offences also within the international tribunal's jurisdiction.

b. Primacy

The Statutes of the ICTY, ICTR, SCSL and STL also explicitly establish the primacy of the international tribunal.¹⁵ In its first case, the ICTY confirmed the Tribunal's primacy. Rejecting the defence's argument that the Tribunal's primacy violated state sovereignty and the defendant's rights, it added:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.¹⁶

The Statutes differ, however, in the universality of their primacy. Whereas the ICTR's Statute provides that the tribunal has primacy 'over the national courts of all [s]tates',¹⁷ the ICTY's Statute is not explicit as to whether the Tribunal's primacy relates only to the state in which the crimes were committed or to all states in the world, or at least all UN Member States. The ICTY's first case demonstrated that in the Court's view it had primacy of jurisdiction vis-à-vis all UN Member States.¹⁸ The ad hoc tribunals could enjoy this primacy with respect to all UN Member States because the primacy was provided by Statutes that had been decided upon by the Security Council.¹⁹ Member States must comply with Security Council decisions.²⁰

¹⁴ Article 8(1) SCSL Statute; Article 4(1) STL Statute.

¹⁵ Article 9(2) ICTY Statute; Article 8(2) ICTR Statute; Article 8(2) SCSL Statute; Article 4(1) STL Statute.

¹⁶ Decision on the Defence Motion for Interlocutory Appeal, *Prosecutor v. Tadić*, IT-94-1-AR72, A. Ch., ICTY, 2 October 1995 ('*Tadić* Interlocutory Appeal'), para. 58.

¹⁷ Article 8(2) ICTR Statute.

¹⁸ *Tadić* Interlocutory Appeal, *supra* note 16, paras 56–60.

¹⁹ For the ICTY Statute, see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993. For the ICTR

The SCSL and STL also enjoy primacy, yet with respect only to the states in which the crimes were committed, namely, Sierra Leone and Lebanon.²¹ The SCSL was established by an agreement between the UN and Sierra Leone and could therefore not bind third states. The parties to that agreement could thus not establish primacy for the SCSL with respect to states other than Sierra Leone. The SCSL Statute does not establish a hierarchy for the event of competing claims to jurisdiction between a non-Sierra Leonean national court and the SCSL. The STL is based on a similar agreement between a state and the UN and therefore cannot bind third states.²²

c. Conditional primacy

While the Statutes of the ICTY, ICTR, SCSL and STL all explicitly state that the tribunals have primacy, this primacy is in fact conditional: only in the circumstances provided by their Statutes and Rules of Procedure and Evidence may the Tribunals ask a state to defer a case to it.²³

In the case of the ICTY, ‘the Prosecutor may propose to the Trial Chamber ... that a formal request be made that [a court in a state] defer to the competence of the Tribunal’ only

[w]here it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

- (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
- (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
- (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal²⁴.

Statute, see UNSC Res. 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994 and Annex thereto.

²⁰ UN Charter, Article 25. See also Article 103.

²¹ Article 8(2) SCSL Statute; Article 4(1) STL Statute.

²² The Security Council could have established the STL’s primacy with respect to all UN Member States in the resolution by which it brought the agreement between the UN and Lebanon into force, but has not done so. Third states requested by the STL pursuant to rule 19 of its RPE to defer a case to its jurisdiction are therefore under no obligation to do so.

²³ See also *Tadić* Interlocutory Appeal, *supra* note 16, para. 59 (noting that ‘The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.’).

²⁴ Rule 9 ICTY RPE.

In practice, the ICTY Trial Chamber has based its requests for deferral on the third ground.²⁵ Politically this is the least sensitive ground as it is based on the interests of the tribunal rather than on an assessment of domestic proceedings.

The ICTR initially had the same grounds as the ICTY on which to base a request for a deferral²⁶ and in its practice, too, all deferral requests were based on the third ground.²⁷ However, the RPE were amended to the effect that whether the Tribunal may request a deferral is even more a matter to the discretion of the Tribunal.²⁸ According to the amended RPE the Prosecutor may apply to the Trial Chamber to issue a formal request for a deferral:

Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State:

- (i) Are the subject of an investigation by the Prosecutor;
- (ii) Should be the subject of an investigation by the Prosecutor considering, inter alia:

²⁵ In *Mrkšić* the Prosecutor also argued the request for the deferral on ground of rule 9(ii) (a lack of impartiality or independence), but the Trial Chamber made the request on grounds of rule 9(iii) alone. Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal, *Prosecutor v. Mrkšić, Šlijvančanin and Radić*, IT-95-13-R61, T. Ch. II, ICTY, 10 December 1998, paras 4–5.

The ground of rule 9(iii) was tested in the *Tadić* Interlocutory Appeal, *supra* note 16. The Appeals Chamber refused to review the Trial Chamber's application of rule 9(iii), affording the Chamber a wide margin of appreciation. *Ibid.*, para. 52.

²⁶ Rule 9 ICTR RPE (as originally adopted on 5 July 1995 and up until the amendment of Rule 9 ICTR RPE adopted on 6 June 1997).

²⁷ Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Alfred Musema (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), *Prosecutor v. Musema*, ICTR-96-5-D, T. Ch. I, ICTR, 12 March 1996 ('*Musema* Deferral'); Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Radio Television Libre des Mille Collines sarl (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), *Prosecutor v. Radio Television Libre des Mille Collines sarl*, ICTR-96-6-D, T. Ch. I, ICTR, 12 March 1996 ('*Mille collines* Deferral'); Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Théoneste Bagosora (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence); *Prosecutor v. Bagosora*, ICTR-96-7-D, T. Ch. I, ICTR, 17 May 1996 ('*Bagosora* Deferral') (all when ICTR still had same Rule 9(iii) as ICTY). Arguments for the criteria of Rule 9(iii) being fulfilled were that the competent national courts could prosecute only for war crimes (neither Swiss nor Belgian criminal legislation at the time contained provisions on crimes against humanity or genocide), avoiding the repetition of testimony, the engendering of distrust of the witnesses, the potential traumatising of the witnesses, and the threat of bodily harm to witnesses. *Musema* Deferral, paras 12 and 13; *Mille collines* Deferral, paras 11 and 12; *Bagosora* Deferral, paras 12 and 13.

²⁸ Rule 9 ICTR RPE (as amended on 6 June 1997, ICTR Fourth Plenary Session).

- (a) The seriousness of the offences;
- (b) The status of the accused at the time of the alleged offences;
- (c) The general importance of the legal questions involved in the case;
- (iii) Are the subject of an indictment in the Tribunal.²⁹

The SCSL has nearly identical grounds on which to request a deferral as the ICTR.³⁰ The STL has the most unconditional primacy of all international criminal tribunals, probably because it has subject-matter jurisdiction over only *one* particular attack (and potentially over attacks of a similar character that are related to that one attack).³¹ The Statute provides explicitly that the Lebanese authorities must defer to the STL's jurisdiction in the particular case and in the potential related cases.³²

In practice, the ICTY, ICTR, SCSL and STL have never declined a Prosecutor's request for a deferral to those respective tribunals in a specific case.³³

d. *Non bis in idem*

The ICTY's and ICTR's Statutes provide that a person may not be subsequently tried by national courts for acts constituting crimes under the statute of the international tribunal for which the person has already been tried by the respective International Tribunal.³⁴ As agreements not binding states other than Sierra Leone or Lebanon, the Statutes of the SCSL and STL prohibit only, respectively, Sierra Leonean and Lebanese courts from trying a person for acts for which he or she has already been tried by the international court.³⁵ Since international law does not prohibit retrial in a different jurisdiction, states other than, respectively, Sierra Leone and Lebanon are thus free to try a person already tried by the international tribunals.

²⁹ Rule 9 ICTR RPE (as amended on 6 June 1997, ICTR Fourth Plenary Session).

³⁰ Rule 9 SCSL RPE.

³¹ Article 1 STL Statute.

³² Article 4(2) and (3) STL Statute. See also Rule 17(E) STL RPE. Since the RPE cannot grant powers beyond those of the Statute, the Rule must be interpreted to apply only to the cases referred to in Article 4(3) STL Statute, namely attacks related to the attack within the Court's jurisdiction.

³³ In one 'rather unusual scenario of concurrent jurisdiction', the ICTY Trial Chamber did refuse in part an application in which the Prosecutor sought, among other things, a request from the Tribunal that the competent authorities in Macedonia generally defer 'current and future investigations and prosecutions'. Decision on the Prosecutor's Request for a Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, In *re The Republic of Macedonia*, Case No. IT-02-55-MISC.6, T. Ch. I, ICTY, 4 October 2002, paras 39, 45–53.

³⁴ Article 10(1) ICTY Statute; Article 9(1) ICTR Statute.

³⁵ Article 9(1) SCSL Statute; Article 5(1) STL Statute.

Whereas the ‘downward’ *non bis in idem* prohibition is absolute, the *non bis in idem* prohibition has exceptions in the scenario that the ICTY, ICTR, SCSL or STL undertake to try a person who has already been tried by a national court. The ICTY, ICTR and SCSL are allowed to do so in two situations: where (1) the act for which he or she was tried was characterized as an ‘ordinary crime’; or (2) the national court proceedings were not impartial or independent, the proceedings were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.³⁶ The STL is allowed to retry only in the latter situation.³⁷

e. Referrals

Obligated by the Security Council to develop a ‘completion strategy’, the judges in the ICTY and ICTR inserted into their RPEs a procedure to refer cases to national jurisdictions. This rule 11 *bis* has been revised multiple times, but in essence it entails that a ‘Referral Bench’ (in the ICTY) or a Trial Chamber (in the ICTR) may determine, *proprio motu* or at the request of the Prosecutor, that a case involving a confirmed indictment³⁸ should be referred to the authorities of a state:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.³⁹

While the STL does not have a procedure to refer cases to national courts, the SCSL can refer cases to national jurisdictions on a ground that is identical to ground (iii) of the ICTY’s and ICTR’s referral procedure.⁴⁰

The ICTY’s, ICTR’s and SCSL’s referral bodies must satisfy themselves that the accused will receive a fair trial and that the death penalty, or, for the SCSL referral body, the

³⁶ Article 10(2)(a)-(b) ICTY Statute; Article 9(2)(a)-(b) ICTR Statute; Article 9(2)(a)-(b) SCSL Statute. See also Rule 13 ICTY RPE; Rule 13 ICTR RPE. For the SCSL this provision applies only to the international crimes, and not to the Sierra Leonean crimes, within its jurisdiction. Article 9(2) SCSL Statute. *A contrario* it can be argued that the SCSL may not retry a person tried for crimes under Sierra Leonean law.

³⁷ Article 5(2) STL Statute. See also Rule 23 STL RPE. The ‘ordinary crimes’ exception is irrelevant in the context of the STL since the jurisdiction of the STL covers only crimes under Lebanese law.

³⁸ Regardless of whether the accused is in the Tribunal’s custody.

³⁹ Rule 11 *bis* (A)(i)-(iii) ICTR RPE; Rule 11 *bis* (A)(i)-(iii) ICTY RPE.

⁴⁰ Rule 11 *bis* (A) SCSL RPE.

term of life imprisonment, shall not be imposed or carried out.⁴¹ The ICTY's Referral Bench should also consider 'the gravity of the crimes charged and the level of responsibility of the accused': if the alleged crimes are sufficiently grave and the accused is characterized as one of the 'most senior leaders', the accused will not be referred to national jurisdictions.⁴² The ICTY's and ICTR's prosecutors may send observers to monitor the domestic proceedings, and, if the accused has not yet been acquitted or found guilty, request the respective tribunal to revoke the order referring the case to the domestic proceedings.⁴³ While neither Tribunals' RPE explicitly indicate the grounds on which the prosecutor may request revocation of an order referring the accused to domestic proceedings, it logically follows that the grounds for revoking a referral order would be the same grounds on which a decision to refer is made.⁴⁴

iii. ICC

a. Concurrent jurisdiction

The jurisdiction of the ICC, too, is concurrent with that of national courts, yet in important ways the ICC's jurisdictional arrangements are distinct from those of the ICTY, ICTR, SCSL and STL.

b. Jurisdictional Hierarchy

Instead of the respective forms of primacy of the ICTY, ICTR, SCSL and STL, the ICC has complementary jurisdiction. This means that the ICC may exercise its jurisdiction in a case

⁴¹ Rule 11 *bis* (C) ICTR RPE; Rule 11 *bis* (B) ICTY RPE; Rule 11 *bis* (B) SCSL RPE.

⁴² Rule 11 *bis* (C) ICTY RPE (footnotes omitted). This focus was imposed by the Security Council in Resolution 1534 (2004) in which it called on the ICTY's and ICTR's respective referral bodies when reviewing new indictments to ensure that only 'the most senior leaders suspected of being most responsible for crimes within the [Tribunals'] jurisdiction' stay within the Tribunals' dockets. UNSC Res. 1534 (2004), UN Doc. S/RES/1534 (2004), 26 March 2004, para. 5. This criterion for referral has resulted in the ironic situation that those accused who prefer trial in the ICTY to domestic prosecution argue that the crimes of which they have been accused are grave and their alleged level of responsibility arises to that of the 'most senior leaders'. See, e.g., Decision on Milan Lukić's Appeal Regarding Referral, *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-AR11*bis*.1, A. Ch., ICTY, 11 July 2007, paras 23–26.

⁴³ Rule 11 *bis* (D)(iv) and (F) ICTR RPE; Rule 11 *bis* (D)(iv) and (F) ICTY RPE.

⁴⁴ The ICTY has not revoked any referral orders, though it has denied a revocation request from a defendant tried, convicted and sentenced in a national jurisdiction after referral by the International Tribunal. Decision on Gojko Janković's Motion of 12 April 2010, *Prosecutor v. Janković*, IT-96-23/2-PT, Ref. Bench, ICTY, 21 June 2010. The ICTR has revoked one referral order. Decision on Prosecution's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11*bis* (F) & (G), *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11*bis*, T. Ch., ICTR, 17 August 2007.

only if the case is not being, or has not been, genuinely investigated or prosecuted by any state.

The ICC, unlike the ICTY, ICTR, SCSL and STL, cannot request a state to ‘defer’ its proceedings to it. Instead, the jurisdictional hierarchy is given effect through a statutory provision on admissibility of cases before the ICC. Article 17(1) of the ICC Statute provides:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;^[45]

(d)^[46]

Article 17(1)(a), (b) and (c) of the ICC Statute envisage two basic scenarios in which cases are admissible before the ICC: first, where no relevant domestic proceedings have been initiated, and secondly, where domestic proceedings have been initiated but the state is unwilling or unable to conduct these proceedings genuinely. If no relevant domestic proceedings have been initiated, cases are admissible before the ICC because there is no ‘case’ that ‘is being investigated or prosecuted’, ‘has been investigated’ or ‘has already been tried’. In the absence of domestic proceedings there is thus no need for any determination of a state’s unwillingness or inability as defined in paragraphs 2 and 3 of Article 17.⁴⁷ In its first case-law the Court has interpreted terms in these provisions in such a way that the criteria for inadmissibility will not easily be fulfilled. For instance, the Appeals Chamber in *Katanga* and

⁴⁵ The drafting is poor in that the condition in this article is that a trial is ‘not permitted’ under Article 20(3) of the ICC Statute, whereas Article 20(3) of the ICC Statute as a whole contains a prohibition.

⁴⁶ Article 17(1)(d) of the ICC Statute provides as a fourth ground of inadmissibility that ‘[t]he case is not of sufficient gravity to justify further action by the Court’, yet this is not an element of complementarity and is therefore not reproduced here.

⁴⁷ See also Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga*, Situation in the DRC, ICC-01/04-01/06-8, P. T. Ch. I, ICC, 10 February 2006 (‘*Lubanga* Arrest Warrant’), para. 40; Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga and Ngudjolo Chui*, Situation in the DRC, ICC-01/04-01/07-1497, A. Ch., ICC, 25 September 2009 (‘*Katanga* Admissibility Appeal’), para. 78; Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in Kenya, ICC-01/09-19, P. T. Ch. II, ICC, 31 March 2010, paras 53–54.

Bemba found a case admissible where domestic investigations were once initiated, but closed in view of the suspect's transfer to the ICC, arguing that this presented neither a situation of ongoing proceedings for the purposes of Article 17(1)(a) nor a decision 'not to prosecute' for the purposes of Article 17(1)(b).⁴⁸ Moreover, the Court has narrowly construed the definition of a 'case', requiring for the same 'case' that the domestic proceedings encompass the same person, substantially the same conduct, the same incidents and (perhaps) the same head of criminal responsibility that form the subject of the ICC's prosecution.⁴⁹ The consequence of this narrow approach to the notion of a 'case' is that national prosecutors will not avoid ICC intervention on grounds of complementarity in a given instance unless they select not only the same person, but also the same conduct, incidents and perhaps even head of criminal responsibility that eventually form the subject of prosecution before the ICC. Even if national investigations or prosecutions were to encompass more serious acts allegedly committed by the accused, the case would be admissible before the ICC as long as the national proceedings did not encompass the very same conduct and incidents as those before the Court.⁵⁰

Where a state has initiated relevant proceedings in the same case, the case is nonetheless admissible before the ICC if the state 'is unwilling or unable genuinely to carry out the investigation or prosecution' or its decision not to prosecute 'resulted from the unwillingness or inability of the [s]tate genuinely to prosecute'.⁵¹ The emphasis of the test is not on being 'able and willing'—the state would seem to be so, given that proceedings are actually taking place or have taken place—but on the more normative requirement that the

⁴⁸ *Katanga* Admissibility Appeal, *supra* note 47, paras 80, 82–83; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', *Prosecutor v. Bemba Gombo*, Situation in the CAR, Case No. ICC-01/05-01/08OA3, A.C., ICC, 19 October 2010, paras 74–75.

⁴⁹ *Lubanga* Arrest Warrant, *supra* note 47, paras 31, 39–41; Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v. Harun and Kushayb*, Situation in Darfur, the Sudan, Case No. ICC-02/05-01/07-1, P. T. Ch. I, ICC, 27 April 2007, para. 24; Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", *Prosecutor v. Ruto, Kosgey and Sang*, Situation in Kenya, Case No. ICC-01/09-01/11 O, A. Ch., ICC, 30 August 2011, paras 39–41.

⁵⁰ See also Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), *Prosecutor v. Katanga and Ngudjolo Chui*, Situation in the DRC, ICC-01/04-01/07-949, Defence, ICC, 11 March 2009, para. 42.

⁵¹ Article 17(1)(a) and (b) ICC Statute.

proceedings be conducted ‘genuinely’.⁵² To date, there has been scant case-law on unwillingness and inability in Article 17,⁵³ so the following analysis is based on the text only.

Unwillingness is defined in Article 17(2) of the ICC Statute:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The three listed indicators of unwillingness confirm, implicitly in the first circumstance and explicitly in the second and third circumstances, that what is at issue is whether the proceedings manifest a lack of intent to bring the person concerned to justice, that is to say to conduct *genuine* proceedings.⁵⁴

Article 17(3) of the ICC Statute provides criteria for the determination of inability genuinely to conduct proceedings:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Accordingly, the Court shall consider both the causes and the consequences of inability to investigate or prosecute. Were total or substantial collapse of the national judicial system the

⁵² In this light, the attenuated references in Articles 17(2) and (3), respectively, to ‘unwillingness’ and ‘inability’ should be taken as shorthand for ‘unwillingness genuinely to investigate or prosecute’ and ‘inability genuinely to investigate or prosecute’. See more elaborately, S.M.H. Nouwen ‘Fine-tuning Complementarity’, in B. Brown (ed.), *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar, 2011), 206, 216–217.

⁵³ Chambers have addressed these elements in obiter dicta, e.g., Decision on the Admissibility and Abuse of Process Challenges, *Prosecutor v. Bemba Gombo*, Situation in the CAR, ICC-01/05-01/08, T. Ch. III, ICC, 24 June 2010, paras 243–247; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, *Prosecutor v. Bemba Gombo*, Situation in the CAR, ICC-01/05-01/08 OA 3, A. Ch., ICC, 19 October 2010, paras 105–109.

⁵⁴ The definition is not concerned with a general unwillingness to conduct proceedings because in most instances in which a state is unwilling to carry out proceedings, there will be no proceedings and the question of genuineness will not arise.

only causes of inability to conduct genuine proceedings, an assessment of ability genuinely to conduct proceedings would hardly ever be necessary; in those scenarios there usually are no cases. However, the third cause of such inability, namely the unavailability of a national judicial system, expands the scope of the provision considerably and reveals the decisiveness of the factor of genuineness. In addition to practical circumstances (a lack of judicial personnel, an insecure environment or a lack of essential cooperation by other states), normative factors such as the applicability of amnesty or immunity laws, the lack of the necessary extradition treaties and the absence of jurisdiction under domestic law, can render a system ‘unavailable’ genuinely to conduct proceedings. Consequently, states with fully functioning criminal justice systems can be found ‘unable’, provided that, in the particular case, the system is unavailable genuinely to conduct proceedings.

c. *Ne bis in idem*

When domestic proceedings have resulted in a trial, the grounds for admissibility of that case before the ICC are narrower. Article 17(1)(c) must be read in conjunction with paragraph 3 of Article 20 (*‘Ne bis in idem’*),⁵⁵ which states:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The genuineness requirement is implicit in the two exceptions to the prohibition of *ne bis in idem*. These exceptions are nearly identical to two of the circumstances that evince unwillingness genuinely to prosecute as defined in Article 17(2).⁵⁶

⁵⁵ See also *Lubanga* Arrest Warrant, *supra* note 47, para. 29. *Cf. contra* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga*, Situation in the DRC, ICC-01/04-01/06-772, A. Ch., ICC, 14 December 2006, para. 23.

⁵⁶ Namely where the proceedings were for the purpose of ‘shielding the person concerned from criminal responsibility’ or where the proceedings demonstrated ‘a lack of independence and impartiality inconsistent with an intent to bring the person concerned to justice’. Article 20(3)(a) and (b) ICC Statute.

Once a domestic trial has been concluded, the inability-to-conduct-the-proceedings-genuinely criterion no longer provides an exception to inadmissibility of a case before the ICC.⁵⁷ For example, a case would not be deemed admissible before the ICC solely because it resulted in an acquittal, an insignificant punishment or an immediate pardon. The circumstances in which the ICC can proceed with a case that has been tried at the domestic level are thus stricter than those of the ICTY and ICTR, namely only if in the domestic trial there was an absence of an intent to bring the concerned person to justice, which can be evinced by shielding⁵⁸ or a lack of independence and impartiality.⁵⁹

d. ‘Deferring’ cases to national jurisdictions

The ICC has two procedures for ‘deferring’ cases to national jurisdictions. First, pursuant to Article 18 the Prosecutor shall defer (in the sense of ‘yield’) to the investigations of a state that informs the Court, within one month after the Prosecutor’s notification of his⁶⁰ intention to open an investigation, that it is investigating or has investigated persons related to the Prosecutor’s announced investigation.⁶¹ If he defers, the Prosecutor may acquire periodic information, preserve evidence, review such a decision and request the Pre-Trial Chamber to end the deferral.⁶² Secondly, Article 19(11) grants the Prosecutor a discretionary power to ‘defer’ (in the sense of ‘postpone’) his investigation.⁶³ If he does so, he may only ask for information, which he can later use to reconsider his decision.⁶⁴

⁵⁷ This reveals the states parties’ intention for the Court not to act as an appellate court. The current arrangement, however, makes it attractive to states to wait to challenge admissibility until a domestic trial has ended.

⁵⁸ Article 20(3)(a) ICC Statute.

⁵⁹ Article 20(3)(b) ICC Statute.

⁶⁰ In the light of the gender of the current Prosecutor, this chapter refers to the Prosecutor as ‘he’.

⁶¹ Article 18(2) ICC Statute and Rule 53 ICC RPE.

⁶² Article 18(3), (5) and (6) ICC Statute and Rules 56–57 ICC RPE.

⁶³ The different meaning of ‘defer’ in Articles 18(2) and 19(11) is confirmed by the French text of the Articles 18(2) (‘le Procureur lui défère’) and 19(11) (‘le Procureur sursoit à enquêter’).

⁶⁴ Pursuant to Article 53(4) of the ICC Statute the Prosecutor may reconsider a decision not to investigate (or prosecute) ‘at any time ... based on new facts or information’, without needing to seek the Pre-Trial Chamber’s authorization. The Statute does not provide for an expiry date for the right to reconsider, but, since future crimes cannot be referred, there must be a connection between the facts the Prosecutor wishes to investigate (or prosecute) and the time-period when the referral was made.

iv. Other Non-exclusively Domestic Courts and Tribunals of Relevance

The Special Panels for Serious Crimes in East Timor (SPSC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have international elements but are part of the domestic legal order of respectively East Timor and Cambodia. For the purpose of jurisdictional arrangements they should therefore be treated as domestic courts and the law governing them can determine their relationship only vis-à-vis other domestic courts. The SPSC were granted exclusive jurisdiction with respect to other courts in East Timor;⁶⁵ the law on the ECCC does not say so explicitly,⁶⁶ but in its practice no competing claims have arisen (yet).

C. CONCLUSION: HYPOTHESES ON THE POTENTIAL OF JURISDICTIONAL ARRANGEMENTS TO SERVE AS A CONDUIT FOR CHANNELLING RULES OF INTERNATIONAL CRIMINAL PROCEDURE TO NATIONAL JURISDICTIONS

On the basis of the previous section's analysis of the jurisdictional arrangements a few hypotheses can be developed on the various arrangements' potential strengths and weaknesses as a conduit of influence on national jurisdictions.⁶⁷

First, the potential influence of international criminal procedure on domestic criminal procedure is enhanced by the fact that none of the international tribunals has exclusive jurisdiction. If international tribunals were to have exclusive jurisdiction, domestic courts would not be able to try the same international crimes, rendering international criminal procedure close to irrelevant at the domestic level.

Secondly, the potential to influence is particularly strong for those arrangements where the international tribunal's competence to request a deferral from a national jurisdiction, exercise its jurisdiction or refer a case to the national jurisdiction depends on the actions of the domestic justice system. The IMT and IMTFE had no such conditionality, leaving little reason for domestic courts to follow the international tribunals' procedure, apart from following a potential model. But the jurisdictional arrangements of the other international

⁶⁵ UNTAET/REG/2000/15, 6 June 2000, para. 1.1.

⁶⁶ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (Unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 26 August 2007). Nor does the agreement between the UN and Cambodia concerning the ECCC speak to jurisdictional arrangements.

⁶⁷ For more elaborate, and different, hypotheses on jurisdictional arrangements as a conduit of influence on domestic processes, see W.W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina', (2008) 46(2) *Columbia Journal of Transnational Law* 279.

tribunals have various conditionalities through which they can influence domestic proceedings.

The ICTY's, ICTR's and SCSL's primacy is not unconditional: only if certain criteria are met can they oblige a state to defer a case to their jurisdiction. The fact that primacy can be invoked on the grounds that the domestic proceedings classify the conduct as ordinary⁶⁸ (as opposed to international) crimes or lack impartiality, independence or diligence, provides an incentive for states that wish to maintain jurisdiction to ensure that they have international crimes on their books and that their procedures are impartial, independent and diligent. The third ground for the invocation of primacy, however, relates to the interest of the tribunal rather than the quality of domestic proceedings. This ground thus decreases the incentive for states to meet any criteria because even if domestic proceedings were to meet all these criteria, the international tribunal could still invoke primacy because of its own interests.

A potentially stronger conduit for the ICTY, ICTR and SCSL to influence domestic criminal procedural law is the conditionality for referring a case to national jurisdictions. To have a case referred to it, the national justice system must meet several criteria, including of international criminal procedural law (a fair trial and no death penalty). The tribunals can monitor the domestic proceedings, and if they deem those proceedings to be insufficient, the tribunal can reclaim the referred case.

With comparatively more complementary jurisdiction, the ICC can strongly influence domestic justice systems. Since a close relation between the case and other cases pursued by the ICC is *not* a ground for jurisdiction of the ICC, in contrast to the ICTY, ICTR and SCSL, the admissibility of cases before the ICC *entirely* depends on the (non)actions of domestic justice systems. States that wish to avoid ICC interference in a case can succeed if they initiate genuine domestic proceedings in the same case. At the same time, the ICC's more complementary jurisdiction limits the conditions by which the Court can assess domestic justice systems. The ICC can claim jurisdiction only if there are no domestic proceedings or if there are domestic proceedings but those proceedings lack genuineness. The ICC can thus not require anything more of domestic proceedings than that they are genuine, as narrowly defined in the Rome Statute in the descriptions of unwillingness and inability.

Similarly, the ICC can exert less influence through conditionality on grounds of *ne bis in idem* than the ICTY, ICTR, SCSL and STL. First, whereas the Statutes of the ICTY, ICTR and SCSL allow those tribunals to retry a case that has been tried in a domestic court if the

⁶⁸ See sources cited in *supra* notes 1 and 36 and corresponding text.

conduct was tried domestically as an ordinary crime, a case would not be rendered admissible before the ICC solely because it was qualified in domestic proceedings as an ordinary crime.⁶⁹ Secondly, whereas the ICTY, ICTR, SCSL and STL may claim jurisdiction on the ground that the domestic proceedings lack(ed) impartiality or independence, irrespective of whether this is to the benefit or detriment of the accused,⁷⁰ a violation of the accused's right to a fair trial at the domestic trial does not provide an independent ground on which the ICC may find a case admissible. A lack of independence or impartiality will be inconsistent with an intent to bring the accused to justice only if it has worked to his or her benefit.

In comparison with the ICTY, ICTR and SCSL, the ICC also has fewer options conditionally to 'defer' cases to domestic jurisdictions. First, the ICC has no procedure for deferring already initiated cases (as opposed to investigations into a general situation) to national jurisdictions. Once a case has been opened it is either admissible or inadmissible before the ICC; the Court cannot determine that the case is inadmissible on the condition that subsequent domestic proceedings fulfil certain criteria.

Secondly, when reviewing domestic investigations for the purpose of Articles 18 and 19(11) the ICC may not set the same conditions as the ICTY, ICTR and SCSL for considering or ending a deferral: prosecution as international crimes instead of ordinary crimes, domestic fair trial standards and the application of the death penalty are no grounds for admissibility of a case before the ICC and thus the ICC cannot set these as conditions for a deferral.

Whether in practice this potential is realized depends on the validity of the assumptions underlying the hypotheses and on intervening variables. One assumption that may not always apply, as evidenced by the phenomenon of so-called 'self-referrals' in the context of the ICC,⁷¹ is that states prefer exercising jurisdiction domestically to international

⁶⁹ Article 20(3) of the ICC Statute refers expressly to 'conduct' rather than to 'crime' in defining the two situations when the ICC is not prohibited from trying someone who has already been tried by another court for conduct that is also proscribed in the ICC's Statute. The use of 'conduct' rather than 'crimes' indicates that the characterization of the impugned behaviour in the domestic proceedings is entitled to deference from the ICC. The use of 'conduct' in Article 20(3) contrasts sharply with the use of 'crime' in Article 20(2), which lays down criteria regarding when a domestic court wishes to try a case after the ICC has. See also Judgement, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, T. Ch., ICTY, 15 March 2006, para. 257 (concluding that 'the Statute of the International Criminal Court leaves the characterisation of the crimes open to national courts').

⁷⁰ Article 10(2)(b) ICTY Statute and Rule 9(ii) ICTY RPE; Article 9(2)(b) ICTR Statute; Article 9(2)(b) SCSL Statute; Article 5(2) STL Statute.

⁷¹ For a more elaborate discussion of this assumption, see S. Nouwen and W. Werner, 'The Law and Politics of Self-Referrals', in A. Smeulers (ed.), *Collective Violence and*

involvement. Intervening variables may also influence the conduit function of jurisdictional arrangements. One of them is mediation of jurisdictional arrangements by norm entrepreneurs: advisors and activists who interpret and explain jurisdictional arrangements by taking into account factors other than the legal texts. Consequently, as anecdotal evidence confirms, the invocation and understanding of jurisdictional arrangements in practice deserve another chapter.⁷²

International Criminal Justice – An Interdisciplinary Approach (Antwerp: Intersentia, 2010) 255.

⁷² See, e.g., F. Mégret, ‘Too Much of a Good Thing? Implementation and the Uses of Complementarity’, in C. Stahn and M.E. Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge: Cambridge University Press, 2011, forthcoming) and S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge Studies in Law and Society, Cambridge University Press, 2012, forthcoming).